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IN THE

# Supreme Court of the United States

**October Term, 1966**

No. 149

SANFORD E. ADAY, WALLACE DeORTEGA MAXEY, and WEST COAST NEWS COMPANY, INC.,
*Petitioners,*

*vs.*

UNITED STATES OF AMERICA,
*Respondents.*

**BRIEF OF AMERICAN BOOK PUBLISHERS COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND UPON THE MERITS.**

HORACE S. MANGES,
*Attorney for American Book Publishers Council, Inc.*
60 East 42nd Street
New York 17, New York

HORACE S. MANGES
STUART M. ROSEN
WEIL, GOTSHAL & MANGES,
*Of Counsel.*

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## BRIEF OF AMERICAN BOOK PUBLISHERS COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND UPON THE MERITS.

### Interest of American Book Publishers Council, Inc.

American Book Publishers Council, Inc., of 1 Park Avenue, New York City, is a membership corporation composed of most of the leading publishers of books of general circulation, including many university presses. It is estimated that the 188 members of the Council publish and distribute over 85% of all general books in the United States. None of the petitioners is a member of the Council.

The Council is deeply interested in safeguarding freedom of the press as guaranteed by the First and Fourteenth Amendments to the Constitution. It sought leave to and did obtain consent of the parties to file this brief,

because it feels that the substantive and evidentiary standards applied by the District Court below improperly deviated from constitutional requirements. The Council, as a matter of policy, takes no position with respect to the obscenity *vel non* of any publication and, therefore, this brief will not address itself to the character of the book involved herein.

## ARGUMENT

### POINT I

**The District Court improperly refused to instruct the jury that the challenged books could not be found obscene unless utterly without redeeming social importance.**

On March 21, 1966, Mr. Justice Brennan in delivering this Court's judgment in *A Book named "John Cleland's Memoirs of a Woman of Pleasure" et al.* v. *Attorney General of the Commonwealth of Massachusetts* U. S. , 16 L ed 2d 1 (1966), wrote an opinion joined in by Chief Justice Warren and Mr. Justice Fortas, stating that total absence of redeeming social importance is an essential element of obscenity:

> "A book can not be proscribed unless it is found to be *utterly* without redeeming social value. This is so even though the book is found to possess the requisite purient appeal and to be patently offensive. Each of the three federal constitutional criteria is to be applied independently; the social value of the book can neither be weighed against nor canceled by its prurient appeal or patent offensiveness." (p. 6)

This position has consistently been advanced by various members of the Court since *Roth* v. *United States*, 354 U. S. 476 (1957). Indeed, we believe that a majority of the members of the present Court adheres to this view and has so indicated either through opinions of the Court or in separate opinions.

Nevertheless, the District Court refused to instruct the jury as requested by defendants' counsel that "A writing may not be deemed obscene unless it is utterly without redeeming social importance * * *" (664a, P. I. 103). We submit that such refusal on the part of the trial judge constitutes reversible error.

## POINT II

**The District Court should have granted defendants' request to read the challenged books aloud to the jury.**

Defendants' counsel requested that the challenged books, which had been admitted in evidence as exhibits—and as the Court said, "were before the jury"—be read aloud in the courtroom. This request was rejected; instead, the Court directed that the books be presented to the jury for reading in the courtroom at the close of the Government's case. 228 F. Supp. 171, 179 (1964). The Court noted that reading the books aloud would (i) cause embarrassment to the females on the jury and in the courtroom, (ii) require considerable time, (iii) would be inconsistent with the nature of the books since they were not intended to be read aloud and (iv) would not permit as fair an accommodation to slow readers as the method directed (p. 178).

We submit that the trial court's reasons for denying defendants' request for oral reading of the challenged books were unconvincing and, at any rate, insufficient to justify its abandonment of the normal procedure for the presentation of documentary evidence to a jury. Particularly in First Amendment criminal cases, a court should take special care to insure, insofar as possible, that evidence is presented in a manner which is fair to a defendant.

We submit that if a book is read to a jury there is greater likelihood that the individual jurors will pay attention to its contents and consider such contents as a whole, as required by *Roth* v. *United States, supra.* If merely copies of the book are furnished to the jurors, there is a strong possibility that they will pay less attention, focus on particular items (such as covers and blurbs) and otherwise fail to evaluate the work as a whole. In the ordinary trial it is basic that exhibits may be read to the jury. *A fortiori,* in order to safeguard First Amendment rights, we urge that no short cuts be indulged in, but that this Court require trial courts in obscenity cases to honor the requests of either the prosecution or the defense to read the challenged material to the jury.

Respectfully submitted,

HORACE S. MANGES,
*Attorney for American Book Publishers Council, Inc.*
60 East 42nd Street
New York 17, New York

HORACE S. MANGES
STUART M. ROSEN
WEIL, GOTSHAL & MANGES,
*Of Counsel.*